

Limiting the Admissibility of Expert Testimony: *Christophersen v. Allied-Signal Corp.*

I. INTRODUCTION

The enactment of the Federal Rules of Evidence in 1975¹ has caused a significant increase in the admissibility of expert testimony.² In determining admissibility, courts typically consider only the qualifications of a witness³ and whether the data used by the expert is of a type reasonably relied upon by other experts in the field.⁴ Thus, as a general rule, questions regarding the reliability or scientific bases of an expert's opinion affect weight rather than admissibility and are left for the jury's consideration.⁵ However, there is a growing debate over this deference to the jury, with some courts advocating stricter judicial scrutiny.⁶ A recent Fifth Circuit decision, *Christophersen v. Allied-Signal Corp.*,⁷ exemplifies the trend towards greater judicial control.

In 1986, Albert Christophersen died as a result of a rare form of metastatic colon cancer.⁸ Christophersen had worked for fourteen years for Marathon Manufacturing Company, which produces nickel/cadmium batteries.⁹ Although Christophersen was not directly involved in the production of the batteries, he was allegedly exposed to the resulting fumes.¹⁰ Christophersen's wife and child brought suit pursuant to the Texas Wrongful Death and Survival Statute¹¹ against Marathon and a number of companies that supplied Marathon with materials.¹² The complaint alleged that the products used were defectively

¹ Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (1988)).

² FED. R. EVID. 702 advisory committee's notes (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

³ FED. R. EVID. 702.

⁴ FED. R. EVID. 703; see also L.L. Plotkin, Note, Brock v. Merrell Dow Pharmaceuticals, Inc.: *What is the Court's Role in Expert Testimony?*, 64 TUL. L. REV. 1263, 1264 (1990).

⁵ Dixon v. International Harvester Co., 754 F.2d 573, 580 (5th Cir. 1985).

⁶ David Bernstein, *Out of the Fryeing Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation*, 10 REV. LITIG., Fall 1990, at 117, 127-28.

⁷ 939 F.2d 1106 (5th Cir. 1991) (en banc) (per curiam), cert. denied, 112 S. Ct. 1280 (1992).

⁸ *Id.* at 1108.

⁹ *Id.*

¹⁰ *Id.*

¹¹ TEX. CIVIL PRACTICE & REMEDIES CODE ANN. §§ 71.001--031 (West 1986).

¹² Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1108 (5th Cir. 1991) (en banc) (per curiam), cert. denied, 112 S. Ct. 1280 (1992).

designed, manufactured, and marketed, and as a result, caused Christophersen's cancer and subsequent death.¹³

Marathon moved for summary judgment, and the district court determined that plaintiffs failed to state a design or manufacturing defect.¹⁴ Plaintiffs did not appeal this ruling. However, the district court also granted Marathon's motion for summary judgment on the marketing defect claim because there was insufficient evidence of causation.¹⁵ Plaintiffs relied on an expert witness who concluded that Christophersen's exposure to nickel and cadmium caused his cancer and death.¹⁶ The district court reviewed the basis for the expert's conclusion and determined that this testimony should be excluded because it was unreliable, and in the alternative, the expert's testimony would have been more prejudicial than probative.¹⁷ On appeal, a panel of the Fifth Circuit reversed, holding that the expert's conclusions "were not so fundamentally unsupported that they would be of no assistance to the jury" and the "questions concerning the bases for the conclusions and issues [should be] considered by the jury . . . and do not render the opinion unreliable and therefore inadmissible."¹⁸

The defendants petitioned for rehearing en banc. The Fifth Circuit granted the petition¹⁹ and affirmed the district court opinion.²⁰ The court held that the district court could look beyond the qualifications of an expert in determining the admissibility of expert testimony.²¹ The court utilized a four-part test in that determination:

- (1) Whether the witness is qualified to express an expert opinion, Fed. R. Evid. 702;
- (2) whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, Fed. R. Evid. 703;
- (3) whether in reaching his conclusion the expert used a well-founded methodology, *Frye v. United States*;²² and
- (4) assuming the expert's testimony has passed the first three tests, whether the

¹³ *Id.*

¹⁴ *Id.* at 1109.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 364 n.2 (5th Cir.), *reh'g granted*, 914 F.2d 66 (5th Cir. 1990), *rev'd per curiam*, 939 F.2d 1106 (5th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1280 (1992).

¹⁸ *Id.* at 367.

¹⁹ *Christophersen v. Allied-Signal Corp.*, 914 F.2d 66 (5th Cir. 1990).

²⁰ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114 (5th Cir. 1991) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 1280 (1992).

²¹ *Id.*

²² 293 F. 1013 (D.C. Cir. 1923).

testimony's potential for prejudice substantially outweighs its probative value.²³

The majority opinion concluded that the expert's testimony did not pass either the Rule 703 or *Frye* prongs of this test;²⁴ hence, the district court's ruling that the testimony was inadmissible was not "manifestly erroneous."²⁵ The United States Supreme Court denied a petition for certiorari on March 2, 1992.²⁶

Christophersen illustrates the movement towards strict judicial scrutiny in the controversy over the admissibility of expert testimony. The most troublesome question of this debate is whether the court should limit the admissibility of an expert opinion because the court deems the expert unreliable—or is this an issue better left to the jury? This Comment will focus on that issue first by considering the traditional standards for admissibility of expert testimony; second, by examining the history of the Fifth Circuit in resolving this issue; third, by analyzing the *Christophersen* decision in regard to traditional standards of admissibility and precedent; and fourth, by considering other attempts to limit expert testimony and the policy behind this trend.

II. TRADITIONAL FACTORS IN THE DETERMINATION OF ADMISSIBILITY OF EXPERT TESTIMONY

A. *The Frye Test*

A special rule for the admissibility of scientific evidence came from the D.C. Circuit's 1923 decision in *Frye v. United States*.²⁷ The appellant in this case had been convicted of murder and sought to introduce evidence that he had passed a "systolic blood pressure deception test."²⁸ The court rejected the evidence and set forth a standard of admissibility that requires the process or theory upon which the evidence is based to be "sufficiently established to have gained general acceptance in the particular field to which it belongs."²⁹ This rule differs from a relevancy approach in which any relevant conclusions by a qualified expert would be admissible.³⁰ The *Frye* rule imposes the additional

²³ *Christophersen*, 939 F.2d at 1110.

²⁴ *Id.* at 1113–16.

²⁵ *Id.* at 1116.

²⁶ *Christophersen v. Allied-Signal Corp.*, 112 S. Ct. 1280 (1992).

²⁷ 293 F. 1013 (D.C. Cir. 1923); see 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 203, at 869 (4th ed. 1992).

²⁸ *Frye*, 293 F. at 1013; see also Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 629 (1988).

²⁹ *Frye*, 293 F. at 1014.

³⁰ STRONG, *supra* note 27, § 203, at 868–69.

burden of general acceptance in the scientific community as a condition of admissibility.³¹

The status of the *Frye* rule has been uncertain, particularly after the enactment of the Federal Rules of Evidence.³² The *Frye* general acceptance standard is not mentioned in Rule 702 or the Advisory Committee's note, and the rule seems to take a relevancy approach.³³ However, because the *Frye* test is not specifically mentioned, its status is uncertain, with commentators taking varying viewpoints. Some argue that the omission is "tantamount to the abandonment of the general acceptance standard,"³⁴ while others argue that because the Federal Rules do not expressly overrule *Frye*, the general acceptance standard remains intact.³⁵ The status of the *Frye* test also remains unclear in the federal circuit courts.³⁶

The August 1991 preliminary draft of the proposed amendments to the Federal Rules of Evidence provides a bit of much needed guidance on this issue. In the proposed change to Rule 702, the committee's note specifically mentions *Frye* by stating that the proposed change "does not mandate a return to the strictures of *Frye v. United States*."³⁷ Thus, it appears that the changes to the Federal Rules will at least acknowledge the *Frye* standard and attempt to clarify *Frye*'s applicability to Rule 702.

³¹ Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980).

³² See Bernstein, *supra* note 6, at 120.

³³ FED. R. EVID. 702 and advisory committee's notes; see Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 765-66 (1990).

³⁴ See Bernstein, *supra* note 6, at 126 n.59 (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 702[03], at 702-36 (1990)).

³⁵ Giannelli, *supra* note 31, at 1229.

³⁶ Some circuits continue to follow *Frye*. *E.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1131 (9th Cir. 1991), *cert. granted*, 61 U.S.L.W. 3061 (U.S. Oct. 13, 1992) (No. 92-102); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1115 (5th Cir. 1991) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 1280 (1992); *United States v. Two Bulls*, 918 F.2d 56, 60 (8th Cir. 1990); *United States v. Smith*, 869 F.2d 348, 351 (7th Cir. 1989). However, other circuits have abandoned the *Frye* standard in favor of the Federal Rules of Evidence. *E.g.*, *United States v. Jakobetz*, 955 F.2d 786, 797 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992); *United States v. Downing*, 753 F.2d 1224, 1232 (3d Cir. 1985). For further discussion, see STRONG, *supra* note 27, § 203, at 871-72; Bernstein, *supra* note 6, at 126; Black, *supra* note 28, at 601; and Steven M. Egesdal, Note, *The Frye Doctrine and Relevancy Approach Controversy: An Empirical Evaluation*, 74 GEO. L.J. 1769, 1769-70 (1986). The consensus among these commentators seems to be that the majority of the courts accept *Frye*, at least in theory, while some circuits remain undecided.

³⁷ FED. R. EVID. 702 advisory committee's notes (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

More importantly, the United States Supreme Court appears poised to address this issue by its recent grant of certiorari in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁸ In that case, the Ninth Circuit held that an expert witness' reanalyses of epidemiological studies provided an insufficient foundation to allow the admission of expert testimony.³⁹ The court relied on *Frye* in reaching that conclusion.⁴⁰ Consequently, it is likely that the Supreme Court's opinion in that case will end the controversy concerning *Frye*'s current applicability to the admissibility of expert testimony.

B. Federal Rule of Evidence 702

Federal Rule of Evidence 702 currently provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁴¹ This rule also permits the testimony of an expert regarding any scientific evidence that is helpful to the jury. This rule incorporates the relevancy standard⁴² and goes further; it allows admission of any expert testimony that will help explain other relevant evidence.⁴³

Rule 702 is intentionally broad and generally viewed as liberalizing the admissibility of scientific evidence.⁴⁴ After the witness is qualified as an expert by the court, the rule appears to leave any questions of reliability to the jury. However, Rule 702 may not place all reliability determinations in the hands of the jury; the court can exclude expert testimony when that testimony will not be helpful to the jury.⁴⁵ This can be the case, for example, when the testimony is too time consuming or will confuse the jury. But can the court deem the testimony as not helpful to the jury because the court considers the testimony unreliable? Some courts have held that questions concerning the reliability of the expert's testimony should go to weight rather than to admissibility.⁴⁶ However, the Third Circuit has stated that the helpfulness requirement in Rule

³⁸ 61 U.S.L.W. 3061 (U.S. Oct. 13, 1992) (No. 92-102).

³⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1131 (9th Cir. 1991), cert. granted, 61 U.S.L.W. 3061 (U.S. Oct. 13, 1992) (No. 92-102).

⁴⁰ *Id.* at 1129-30.

⁴¹ FED. R. EVID. 702.

⁴² "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

⁴³ Jonakait, *supra* note 33, at 765.

⁴⁴ Bernstein, *supra* note 6, at 133.

⁴⁵ Jonakait, *supra* note 33, at 768.

⁴⁶ *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988); *International Adhesive Coating v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985).

702 “implies a quantum of reliability beyond that required to meet a standard of bare logical relevance.”⁴⁷ What that standard of reliability is remains uncertain.

The August 1991 preliminary draft of the proposed amendments to the Federal Rules of Evidence, once again, provides some clarification. The proposed amendment to Rule 702 explicitly requires the testimony to be “reasonably reliable” and to “*substantially* assist the trier of fact.”⁴⁸ The committee’s note states that the rule requires the court to reject testimony that either lacks significant support in the scientific community or is of only marginal help to the factfinder.⁴⁹ The proposed change is still ambiguous regarding the quantum of reliability required, but does give the court the authority to assess “reasonable reliability” in making its determination of admissibility.

C. Federal Rule of Evidence 703

Rule 703 permits an expert to base an opinion or inference on facts or data perceived by the expert at or before the hearing, either by firsthand observation, evidence at trial, or facts presented to the expert outside of the courtroom.⁵⁰ The rule goes on to state that the facts or data need not be admissible if they are of a type reasonably relied upon by other experts in the field.⁵¹ Thus, the rule allows the expert to rely on facts or data, even in the form of inadmissible hearsay, if other experts would rely on that type of data in forming an opinion.

Some courts have interpreted this rule differently, choosing to impose a standard of minimum reliability upon the facts or data relied upon by the

⁴⁷ *United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir. 1985); *see also In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 857 (3d Cir. 1990) (quoting *Downing* and citing *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 957 (3d Cir. 1990)), *cert. denied*, 111 S. Ct. 1584 (1991).

⁴⁸ FED. R. EVID. 702 (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991) (emphasis added). The proposal for Rule 702 is as follows:

Rule 702. Testimony by Experts

Testimony providing scientific, technical, or other specialized information, in the form of opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony.

Id.

⁴⁹ *Id.* at advisory committee’s notes.

⁵⁰ FED. R. EVID. 703 and advisory committee’s notes.

⁵¹ *Id.*

expert.⁵² The Fifth Circuit adopted this interpretation and stated that "Rule 703 . . . requires courts to examine the reliability of these sources."⁵³ In *Viterbo v. Dow Chemical Co.*,⁵⁴ the Fifth Circuit continued to examine reliability as a function of Rule 703. The court stated that "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility[;] . . . [however,] [i]f an opinion is fundamentally unsupported then it offers no expert assistance to the jury."⁵⁵ In this situation, the court advocated a judicial determination of threshold reliability.⁵⁶ In yet another approach, the Third Circuit has stated that "[t]he proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem [reliable]."⁵⁷ The opinion further required the district court to make a factual inquiry as to what data experts in the field find reliable.⁵⁸

The question of whether Rule 703 requires a judicial assessment of reliability remains uncertain. The preliminary draft of the proposed changes to the Federal Rules of Evidence does not address Rule 703.⁵⁹ However, because the proposed change to Rule 702 contains a reliability requirement for the expert's information,⁶⁰ in the future courts may be able to assess reliability via Rule 702 without having to look to Rule 703.

D. Federal Rule of Evidence 403

Rule 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁶¹ The Advisory Committee's note defines unfair prejudice as an "undue tendency to

⁵² See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

⁵³ *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983).

⁵⁴ 826 F.2d 420 (5th Cir. 1987).

⁵⁵ *Id.* at 422; see also *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989) (holding that a trial court should exclude expert opinion only if so fundamentally unsupported that it cannot help the factfinder).

⁵⁶ *Viterbo*, 826 F.2d at 422.

⁵⁷ *In re Japanese Elec. Prods.*, 723 F.2d 238, 276 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁵⁸ *Id.* at 277.

⁵⁹ See FED. R. EVID. (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

⁶⁰ *Id.* at Rule 702.

⁶¹ FED. R. EVID. 403.

suggest decision on an improper basis.”⁶² Rule 403 provides for judicial scrutiny prior to the admission of otherwise relevant evidence. The rule is significant for expert testimony because jurors have a tendency to over-rely on expert opinions;⁶³ thus, the court must weigh this potential for prejudice against the probative value of the expert testimony. The difficult aspect of the application of Rule 403 is the court’s consideration of the reliability of the evidence in determining its probative value. Although reliability is a factor in the probative value of expert testimony, who should determine reliability—the court or the jury?

Some courts have used Rule 403 to exclude otherwise admissible expert testimony.⁶⁴ In *Viterbo*, the court excluded expert testimony by using a combination of Rule 703 and Rule 403.⁶⁵ The court stated that the “lack of reliable support may render [the evidence] more prejudicial than probative.”⁶⁶ However in other cases, courts have stated that Rule 403 should be used sparingly, and with caution.⁶⁷

III. THE FIFTH CIRCUIT’S RECENT HISTORY REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY

The controversy concerning the judicial role in assessing the reliability of expert testimony has had different outcomes in the various federal circuit courts.⁶⁸ In the Fifth Circuit, the recent trend has been towards active judicial review.⁶⁹ In 1983, the Fifth Circuit stated that a trial court is required by Rule 703 to examine the reliability of the expert’s sources of information upon which the expert’s opinion will be based.⁷⁰ However, in a later case the court stated that the district court should defer to the expert’s view on the type of

⁶² *Id.* at advisory committee’s notes.

⁶³ See *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1256 (E.D.N.Y. 1985), *aff’d on other grounds*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

⁶⁴ *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1321 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); see also Anne S. Toker, Note, *Admitting Scientific Evidence in Toxic Tort Litigation*, 15 HARV. ENVTL. L. REV. 165, 166–77 (1991).

⁶⁵ *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

⁶⁶ *Id.*

⁶⁷ *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979); see also *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941, 957 (3d Cir. 1990) (stating that Rule 403 is an unlikely basis for exclusion if testimony survives Rule 702 and Rule 703).

⁶⁸ See *infra* text accompanying notes 142–65.

⁶⁹ Plotkin, *supra* note 4, at 1266.

⁷⁰ *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983).

information typically relied upon by experts in the field.⁷¹ In 1985, the Fifth Circuit applied a strict interpretation of Federal Rule of Evidence 403 to exclude evidence that asbestos is carcinogenic, holding that the probative value of the evidence was outweighed by the danger of unfair prejudice.⁷²

The real explosion came in 1986, in *In re Air Crash Disaster at New Orleans*.⁷³ In this wrongful death action, the court disallowed the testimony of an economist because this testimony was "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis [for the calculation of damages]." ⁷⁴ Judge Patrick Higginbotham discussed the court's role in the admissibility of expert testimony and stated that "it is time to take hold of expert testimony in federal trials."⁷⁵ Judge Higginbotham directed this statement toward appellate judges, warning that although a deferential standard should be used, appellate judges must address the decisions in which expert testimony was "simply tossed off to the jury under a 'let it all in' philosophy."⁷⁶ Professor Gerald R. Powell has called this ruling the start of the "backlash" to the proliferation of expert testimony that came about with the adoption of the Federal Rules of Evidence.⁷⁷

The next major decision was *Viterbo v. Dow Chemical Co.*,⁷⁸ in which the court asked the question "whether it is so if an expert says it is so."⁷⁹ In this toxic tort case the opinion of the plaintiff's expert was excluded under Rule 703 and 403. The court stated that the underlying data on which the expert based the opinion was lacking in reliability and probative value, and granted summary judgment in favor of the defendant.⁸⁰ Thus, the court answered its own question in the negative.⁸¹

In *Brock v. Merrell Dow Pharmaceuticals, Inc.*,⁸² parents of a child with birth defects brought suit against a drug manufacturer, alleging that a prescription drug taken during pregnancy had caused the child's birth defects.⁸³ The jury found for the plaintiffs, and the defendants unsuccessfully moved for a

⁷¹ *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1495 (5th Cir. 1985).

⁷² *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1321 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); *see also* Toker, *supra* note 64, at 168-75.

⁷³ 795 F.2d 1230 (5th Cir. 1986).

⁷⁴ *Id.* at 1235.

⁷⁵ *Id.* at 1234.

⁷⁶ *Id.*

⁷⁷ Gary Taylor, *Expert Witness Opinion Eyed*, NAT'L L.J., Oct. 21, 1991, at 3, 35.

⁷⁸ 826 F.2d 420 (5th Cir. 1987).

⁷⁹ *Id.* at 421.

⁸⁰ *Id.* at 421-22.

⁸¹ *See* Plotkin, *supra* note 4, at 1266.

⁸² 874 F.2d 307 (5th Cir. 1989), *modified for clarification*, 884 F.2d 166, *cert. denied*, 494 U.S. 1046 (1990).

⁸³ *Id.* at 308.

judgment notwithstanding the verdict.⁸⁴ On appeal, the court held that the plaintiffs' expert's testimony was inadmissible and that the plaintiffs had not shown evidence of causation.⁸⁵ The court noted that judges must "evaluate the reasoning process by which the experts connect data to their conclusions in order for courts to consistently and rationally resolve the disputes before them."⁸⁶ Thus, the court used active judicial scrutiny, rather than deference to the jury, in reaching its conclusion.

The Fifth Circuit has continued to utilize active judicial scrutiny, recently holding that a district court acted within its authority in evaluating the reliability of experts;⁸⁷ the testimony of an expert was properly excluded because it was too speculative;⁸⁸ and the testimony of an expert could be excluded if his calculations were not supported by the record⁸⁹ or he lacked the proper training.⁹⁰ *Christophersen* has followed this line of cases, advocating strict judicial scrutiny of expert testimony.⁹¹

IV. EVALUATION OF *CHRISTOPHERSEN*

A. Christophersen's *Four-Part Framework*

Christophersen evaluated the admissibility of expert testimony by setting forth a four-part test, requiring adherence to: (1) Federal Rule of Evidence 702; (2) Federal Rule of Evidence 703; (3) the *Frye* test; and, if the first three threshold tests are met, (4) evaluation under Federal Rule of Evidence 403.⁹² The court stated that all of these factors must be considered in questions of admissibility of expert testimony.⁹³

⁸⁴ *Id.*

⁸⁵ *Id.* at 312.

⁸⁶ *Id.* at 310; *see also* Plotkin, *supra* note 4, at 1267; David A. Schlueter, *Evidence: Fifth Circuit Survey June, 1989-May, 1990*, 22 TEX. TECH L. REV. 573, 598 (1991).

⁸⁷ *Slaughter v. Southern Talc Co.*, 919 F.2d 304 (5th Cir. 1990).

⁸⁸ *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990); *see also* *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.) *cert. denied*, 113 S. Ct. 79 (1992).

⁸⁹ *Randolph v. Laeisz*, 896 F.2d 964, 967 (5th Cir. 1990).

⁹⁰ *Sullivan v. Rowan Cos.*, 952 F.2d 141, 145 (5th Cir. 1992); *see also* *Benavides*, 955 F.2d at 973.

⁹¹ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 1280 (1992).

⁹² *Id.* at 1110.

⁹³ *Id.*

1. Rule 702

Rule 702 governs the qualifications of an expert witness.⁹⁴ Although the district court in *Christophersen* did not base its disallowance of the expert's testimony on Rule 702, the court did question the expert's qualifications.⁹⁵ The fact that the expert was not an oncologist or pathologist, although he was an M.D., bothered the court.⁹⁶ The majority noted that the questioning of an expert's qualifications does not stop simply because the expert has an M.D.; the expert's opinion must assist the factfinder.⁹⁷ The majority also stated that "the inquiry into the qualifications of an expert should not be a substitute for scrutinizing an expert's reasoning or methodology."⁹⁸

In a concurring opinion, Judge Clark disagreed with the majority and pointed out that Rule 702 does not require the expert's *opinion* to assist the factfinder, but only requires that the expert's *specialized knowledge* assist the factfinder to understand the evidence or determine a fact in issue.⁹⁹ Judge Clark further stated that the witness was qualified to testify as an expert under Rule 702.¹⁰⁰

The court did not discuss whether Rule 702 requires the expert testimony to be reliable in order to assist the factfinder. As previously stated, this issue is handled differently by various courts.¹⁰¹ Although currently there is not a definitive answer to this question, the proposed amendment to Rule 702 would end the controversy because it has an explicit reliability requirement.¹⁰²

2. Rule 703

Rule 703 addresses the requirements for the facts or data relied upon by the expert in forming an opinion, allowing an expert to rely upon inadmissible sources of facts or data.¹⁰³ The expert on *Christophersen* based his opinion on information from the affidavit of a Marathon employee.¹⁰⁴ The court determined that the affidavit was inaccurate and incomplete; hence, the source

⁹⁴ FED. R. EVID. 702.

⁹⁵ *Christophersen*, 939 F.2d at 1112.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1110.

⁹⁹ *Id.* at 1116-17 (Clark, J., concurring); FED. R. EVID. 702.

¹⁰⁰ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1116-17 (5th Cir. 1991) (en banc) (Clark, J., concurring), *cert. denied*, 112 S. Ct. 1280 (1992).

¹⁰¹ See *supra* notes 44-47 and accompanying text.

¹⁰² FED. R. EVID. 702. (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

¹⁰³ FED. R. EVID. 703.

¹⁰⁴ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1113 (5th Cir. 1991) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 1280 (1992).

of the expert's opinion was unreliable.¹⁰⁵ The court quoted *Viterbo* and stated that although the general rule is that questions regarding the scientific bases of an expert's opinion affect the weight of the opinion rather than admissibility, this general rule yields when "the source upon which an expert's opinion relies is of such little weight . . . that [the] testimony would not actually assist the jury"¹⁰⁶ The majority went on to state that although Rule 703 is directed towards allowing an expert to base his opinion on inadmissible sources, the "inquiry into the types of facts and data underlying an expert's testimony is not limited to the admissibility of that data."¹⁰⁷ The majority followed the Fifth Circuit precedent on this issue.¹⁰⁸

Judge Clark, in his concurrence, joined with the dissent to argue that the majority ignored the plain words and the plain meaning of Rule 703.¹⁰⁹ Judge Clark opined that *Viterbo* was decided wrongly, and that the Fifth Circuit has continued to follow this "erroneous construction."¹¹⁰ The basis of Judge Clark's opinion was that Rule 703 only looks to the facts and data that the expert relies upon.¹¹¹ If these facts and data are admissible, Rule 703 does not authorize exclusion of expert testimony.¹¹² If these facts and data are not admissible, the court looks to the reliability of these types of facts and data.¹¹³ If the reliability requirement is met, Rule 703 does not authorize exclusion.¹¹⁴ If it is not met, the court can exclude the testimony.¹¹⁵ This reliability requirement is met if similar experts use the same type of facts and data to form an opinion; the rule does not address the expert's "methodology."¹¹⁶ Judge Clark noted that the district court did not determine the admissibility of the facts and data used by the expert, and stated that these facts and data should have been considered admissible.¹¹⁷ Thus, Rule 703 could not authorize exclusion of this evidence.

Judge Clark and the dissent appear to be interpreting Rule 703 correctly, despite the Fifth Circuit's decisions that support the majority opinion. Rule 703 is not a rule of exclusion, but simply a means of admitting expert testimony that is based on inadmissible facts and data. The Fifth Circuit has stretched the language of Rule 703 to construe a reliability requirement in all circumstances;

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

¹⁰⁷ *Id.* at 1114.

¹⁰⁸ See *supra* notes 68-91 and accompanying text.

¹⁰⁹ *Christophersen*, 939 F.2d at 1117 (Clark, J., concurring).

¹¹⁰ *Id.* at 1118.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1119.

the rule requires the facts and data to be reliable *only* when they are in the form of inadmissible evidence. Moreover, Rule 703 deals with the *type* of facts and data relied upon by experts in the field.¹¹⁸ An affidavit of a fellow employee is the type of facts and data an expert would rely on in this situation. The Fifth Circuit has looked well beyond the type of facts and data and into the issue of reliability itself. The jury, and not the court, should conduct this scrutiny into reliability. The fact that the purpose of Rule 703 was to broaden the universe of admissible expert testimony supports this interpretation.¹¹⁹

3. *The Frye Test*

The *Frye* “general acceptance” test has been interpreted and regarded very differently by different courts.¹²⁰ The Fifth Circuit has limited the doctrine to the admissibility of “novel scientific evidence.”¹²¹ However, the majority opinion of *Christophersen* utilized the *Frye* test, and defined it as “whether the methodology or reasoning that the expert uses to connect the facts to his conclusion is generally accepted within the relevant scientific community.”¹²² The majority felt that this test was not met because the expert’s methodology was flawed. The expert presumed—without scientific foundation—that because exposure to nickel and cadmium was associated with lung cancer, that exposure was also associated with colon cancer.¹²³ The majority determined that this presumption invalidated the expert’s methodology.

In a vigorous dissent, Judge Reavley criticized the majority’s liberal reading of *Frye*, noting that “[n]ow the Fifth Circuit, without precedent, reaches beyond novel device or technique and subjects expert reasoning to judge-determined reliability.”¹²⁴

Judge Clark agreed with the dissent and noted that *Frye* did not survive the Federal Rules of Evidence.¹²⁵ Judge Clark stated that even if the *Frye* test had survived, it would not be applicable in diversity cases under the *Erie* doctrine¹²⁶ and is not a good rule that the court should adopt.¹²⁷

The dissent is correct in concluding that the majority devised its own reading of *Frye*. The majority has confused the meaning of *Frye* by suggesting

¹¹⁸ FED. R. EVID. 703.

¹¹⁹ FED. R. EVID. 703 advisory committee’s notes.

¹²⁰ See *supra* notes 27–40 and accompanying text.

¹²¹ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1133 (5th Cir. 1991) (en banc) (per curiam), cert. denied, 112 S. Ct. 1280 (1992).

¹²² *Id.* at 1115.

¹²³ *Id.*

¹²⁴ *Id.* at 1132 (Reavley, J., dissenting).

¹²⁵ *Id.* at 1120 (Clark, J., concurring).

¹²⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹²⁷ *Id.*

that it imposes a judicial scrutiny of an expert's methodology. This is a very liberal reading of the case, which seems particularly inappropriate in light of the uncertain status of *Frye* following the adoption of the Federal Rules of Evidence. Unless the Supreme Court holds otherwise,¹²⁸ it is highly unlikely that the *Frye* test has survived the enactment of the Federal Rules of Evidence.

4. Rule 403

Rule 403 allows the court to exclude otherwise admissible evidence if "its probative value is substantially outweighed by the danger of unfair prejudice."¹²⁹ The majority opinion in *Christophersen* did not discuss Rule 403, stating that it was unnecessary because the testimony did not meet the standards of either Rule 703 or the *Frye* test.¹³⁰ In setting up its four-part test, the majority distinguished Rule 403 from the other factors, stating that Rule 702, Rule 703, and *Frye* were threshold requirements while Rule 403 was an "overlay."¹³¹ The majority considered Rule 403 to be a final tool for judicial exclusion of otherwise admissible testimony.¹³²

In his concurrence, Judge Clark concluded that the expert testimony should be excluded solely under Rule 403.¹³³ Judge Clark stated that the fact that a witness is deemed an expert has a great effect on a jury and would "certainly be an improper basis for a jury's decision."¹³⁴ Moreover, Judge Clark felt that "[a]n analysis of probity versus unfair prejudice almost always depends to some extent on facts."¹³⁵ Judge Clark concluded his discussion of Rule 403 by pointing out that there was not manifest error in the district court's holding that the probative value of the expert testimony was substantially outweighed by the danger of unfair prejudice.¹³⁶

In the dissent, Judge Reavley disagreed with this assessment and stated that the judge's opinion of the contested evidence should not determine the reliability or relative merit of the evidence.¹³⁷ Judge Reavley concluded that exclusion of the testimony based on Rule 403 was just as erroneous as excluding the testimony on the basis of either Rule 703 or *Frye*.¹³⁸

¹²⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 61 U.S.L.W. 3061 (U.S. Oct. 13, 1992) (No. 92-102).

¹²⁹ FED. R. EVID. 403.

¹³⁰ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1116 (5th Cir. 1991) (en banc) (per curiam), *cert. denied*, 112 S. Ct. 1280 (1992).

¹³¹ *Id.* at 1110.

¹³² *Id.*

¹³³ *Id.* at 1120 (Clark, J., concurring).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1121.

¹³⁶ *Id.* at 1121-22.

¹³⁷ *Id.* at 1135 (Reavley, J., dissenting).

¹³⁸ *Id.*

The real difficulty in the application of Rule 403 is the scrutiny into the reliability required to determine the probative value of the evidence. There is not a clear answer to the question of who should conduct this scrutiny—the judge or the jury. While the judge must assess the probative value of the evidence, this assessment should not include taking questions of reliability away from the jury. The Advisory Committee's notes to Rule 403 do not provide any guidance as to how far the judge should go in the determination of probative value.¹³⁹ Additionally, the proposed changes to the Federal Rules do not address Rule 403.¹⁴⁰ Thus, for the time being, this question remains unanswered. Rule 403 is in place to allow the judge one final look at the contested evidence prior to determining admissibility in order to prevent unfair prejudice. However, there is a presumption of admissibility of relevant evidence under the Federal Rules;¹⁴¹ thus, the judge should leave truly contested questions of reliability to the jury.

B. Comparing Christophersen to other Federal Circuit Decisions

1. Change in the D.C. Circuit

The D.C. Circuit advocated a passive approach to the judicial scrutiny of expert testimony in its 1984 decision in *Ferebee v. Chevron Chemical Co.*¹⁴² In this toxic tort case, the court reviewed the denial of the defendant's motion for judgment notwithstanding the verdict. The motion was based upon the alleged failure of the plaintiff's expert to prove that defendant's chemical was the cause of the plaintiff's illness. The court affirmed the denial of the motion, holding that the jury was competent to weigh the credibility of expert testimony.¹⁴³ The court stated that when the evidence consists of a "battle of the experts" the jury must act as the factfinder.¹⁴⁴ Thus, the *Ferebee* court concluded that expert testimony in toxic tort cases should be given only minimal judicial scrutiny.¹⁴⁵

However, the D.C. Circuit decided to take a more active judicial role in its 1988 decision in *Richardson ex rel. Richardson v. Richardson-Merrell, Inc.*¹⁴⁶ In that case, the court had to determine whether the drug Bendectin had caused the plaintiff's birth defects. The court rejected the plaintiff's expert based on

¹³⁹ See FED. R. EVID. 403 advisory committee's notes.

¹⁴⁰ See FED. R. EVID. (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

¹⁴¹ See FED. R. EVID. 402.

¹⁴² 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

¹⁴³ *Id.* at 1534.

¹⁴⁴ *Id.*; see also Plotkin, *supra* note 4, at 1265.

¹⁴⁵ Plotkin, *supra* note 4, at 1265.

¹⁴⁶ 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989).

Rule 703,¹⁴⁷ concluding that the judge needed to maintain control over the evidence presented to the jury.¹⁴⁸ The D.C. Circuit did not overrule *Ferebee*, but distinguished it by limiting its holding to those cases in which the scientific evidence is novel, or "at the frontier of current medical . . . inquiry."¹⁴⁹ The D.C. Circuit felt that the issue presented in *Richardson* was established in the medical community, and thus subject to strict judicial scrutiny.¹⁵⁰ This about face in the D.C. Circuit is further evidence of the trend towards stricter judicial control of expert testimony.

2. Direct Conflict with the Third Circuit

The Third Circuit recently decided a case with an expert testimony issue similar to that in *Christophersen*. *In re Paoli R.R. Yard PCB Litigation*¹⁵¹ was a consolidation of suits brought by thirty-eight persons who either worked or lived near a rail yard. The plaintiffs sought damages because of injuries allegedly caused by exposure to polychlorinated biphenyls (PCBs).¹⁵² The Third Circuit reviewed a district court's decision to grant summary judgment based on the exclusion of plaintiffs' expert opinion testimony. The district court used a combination of Rule 702, Rule 703, and Rule 403 to exclude the evidence.¹⁵³ The Third Circuit reversed the decision of the district court, holding that the court erred in the exclusion of the expert opinion testimony.¹⁵⁴ The Third Circuit stated that its "scrutiny of the [evidentiary] rulings . . . focus[ed] not only upon their legal foundations, but also on the procedures by which they were made and the adequacy of their articulation."¹⁵⁵ The *Paoli* court reversed the evidentiary exclusions because the district court failed to follow protocols of Rule 702 and Rule 703,¹⁵⁶ applied too stringent a standard to the qualification of experts under Rule

¹⁴⁷ *Id.* at 829.

¹⁴⁸ *Id.*; see also Plotkin, *supra* note 4, at 1267.

¹⁴⁹ *Richardson*, 857 F.2d at 832.

¹⁵⁰ *Id.*

¹⁵¹ 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991). The *Paoli* court favorably cited the Third Circuit's earlier decision in *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990) (holding that an expert's opinion could not be excluded merely because the weight of scientific evidence was against him; and specifically rejecting the *Frye* standard). *Paoli*, 916 F.2d at 854-58.

¹⁵² *Id.* at 835.

¹⁵³ *Id.* at 853.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 835-36.

¹⁵⁶ *Id.* at 836.

702,¹⁵⁷ failed to articulate adequately what facts it relied upon in making its legal determination,¹⁵⁸ and misapplied Rule 403.¹⁵⁹

Paoli is factually similar to *Christophersen*. In both cases the appellate courts were called upon to review a district court's grant of summary judgment because of the exclusion of the plaintiff's expert opinion testimony. In both cases, the district courts utilized strict judicial scrutiny of the expert opinion testimony and based their exclusions of the testimony on unreliability. While the Third Circuit in *Paoli* rejected this approach and reversed the summary judgment, the Fifth Circuit in *Christophersen* endorsed this approach and affirmed the summary judgment. The United States Supreme Court denied petitions for certiorari in both *Paoli*¹⁶⁰ and *Christophersen*.¹⁶¹

However, Justice White, in his dissent to the denial of certiorari in *Christophersen*, encouraged the Supreme Court to offer direction to the lower courts by deciding a case regarding the admission of expert testimony, so as to resolve the direct conflict that currently exists among the circuit courts.¹⁶² Justice White acknowledged that the courts are divided and stated that "[b]ecause this is an important recurring issue, [the Supreme Court] should grant certiorari"¹⁶³ The Supreme Court has apparently heeded Justice White's advice by recently granting certiorari in a case dealing with the exclusion of expert testimony under the *Frye* standard.¹⁶⁴ Although *Frye* is only one aspect of the expert testimony conflict, the Supreme Court's clarification of *Frye*'s current applicability, along with the possible amendments to the Federal Rules of Evidence,¹⁶⁵ should put an end to this conflict.

V. TRENDS TOWARDS ACTIVE JUDICIAL REVIEW

As Judge Higginbotham articulated, courts increasingly feel that "[i]t is time to take hold of expert testimony."¹⁶⁶ Perhaps because of the flood of expert testimony in today's trials and the relatively flexible standards of admissibility of the Federal Rules of Evidence, courts are searching for ways to take control of expert testimony. This trend towards stricter judicial control of expert testimony is evidenced in several proposed changes.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 854.

¹⁵⁹ *Id.* at 859.

¹⁶⁰ *General Elec. Co. v. Knight*, 111 S. Ct. 1584 (1991).

¹⁶¹ *Christophersen v. Allied-Signal Corp.*, 112 S. Ct. 1280 (1992).

¹⁶² *Id.* at 1281 (White, J., dissenting).

¹⁶³ *Id.*

¹⁶⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991), cert. granted, 61 U.S.L.W. 3061 (U.S. Oct. 13, 1992) (No. 92-102).

¹⁶⁵ FED. R. EVID. (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

¹⁶⁶ *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986).

A. *Proposed Changes in the Federal Rules of Evidence*

The August 1991 *Preliminary Draft of the Proposed Changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence* recommended a change to Rule 702 that will help judges better control the admissibility of expert testimony. This change will require the expert's opinion to be "reasonably reliable" in order to be admissible.¹⁶⁷ This revision is intended to limit the use, but increase the reliability, of expert opinion testimony.¹⁶⁸

B. *Agenda for Civil Reform in America*

A report from the President's Council on Competitiveness has addressed the problem of expert witness testimony.¹⁶⁹ The report stated that "[a]n area of the law particularly ripe for reform is expert witness practice."¹⁷⁰ The report continued by stating that the Federal Rules of Evidence have eliminated many of the common-law restrictions on the use of expert witnesses. This elimination has resulted in the "uncontrolled use of expert witnesses" and "allowed junk science to tarnish the legal process."¹⁷¹

The expert evidence reform suggested in the report recommends, in part, amending Federal Rule of Evidence 702.¹⁷² The amendments to Rule 702 would consist of a requirement that expert testimony be based on "widely accepted" theories, a ban on contingency fee payments for expert witnesses, and an express requirement that courts determine that the expert is qualified in his or her field.¹⁷³ Additionally, the report recommends that Federal Rules of Civil Procedure 26 be amended to require additional disclosure from expert witnesses in discovery.¹⁷⁴ It should be noted that the proposed changes to Federal Rule of Civil Procedure 26 includes this amendment suggested by the Council on Competitiveness.¹⁷⁵

¹⁶⁷ FED. R. EVID. 702 (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

¹⁶⁸ *Id.* at advisory committee's notes.

¹⁶⁹ A Report from the President's Council on Competitiveness, *Agenda for Civil Justice Reform in America*, August 1991.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

¹⁷² *Id.* at 21.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ FED. R. CIV. P. 26(a)(2) (Prelim. Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, August 1991).

C. American Law Institute's Proposals

The dissent in *Christophersen* discussed methods of taking control of expert testimony without taking over.¹⁷⁶ Judge Reavley stated that the American Law Institute is presently considering a proposal for "Blue Ribbon Science Panels" and a "Federal Science Board" to assist courts in the matter of scientific questions.¹⁷⁷ The dissent advocated the use of presently available methods, such as appointing special masters, to gain control of expert testimony without distorting the Federal Rules of Evidence.¹⁷⁸

These recommendations are evidence of the trend towards tighter judicial control of expert testimony. While these recommendations are not ideal, they do illustrate that an awareness of the problems associated with the admissibility of expert testimony exists and that solutions are actively being sought.

VI. CONCLUSION

The proliferation of "expert" testimony is threatening the integrity of legal proceedings, and many courts are now becoming justifiably concerned about the reliability of such testimony. The crux of this issue is whether the court should make an initial reliability determination of expert testimony or completely defer to the jury on this issue. The courts seem to be struggling with finding the authority to empower themselves to make this threshold reliability determination. However, at present, an adequate basis for this type of judicial control does not exist.

Misapplication of the Federal Rules of Evidence is not the proper solution. The *Christophersen* majority misapplied Rule 702 and Rule 703 to assert control over the reliability determination. In addition, the court relied on the *Frye* doctrine to determine the reliability of the testimony. Unless the Supreme Court holds otherwise, it seems unlikely that *Frye* has survived the enactment of the Federal Rules of Evidence.

By not admitting this testimony, the Fifth Circuit impermissibly usurped the jury's role in determining the reliability of evidence. The present Federal Rules of Evidence do not permit this; in fact, the rules have a strong presumption in favor of admissibility. No matter how well-intentioned, the courts cannot bend the Federal Rules to meet their objectives.

The proposed changes to the Federal Rules are a step in the right direction. The proposed change to Rule 702 would allow courts to make a threshold determination of "reasonable reliability" prior to admitting expert testimony.

¹⁷⁶ *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1129 (5th Cir. 1991) (en banc) (per curiam), cert. denied, 112 S. Ct. 1280 (1992).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

The jury would then make all further reliability assessments. This threshold determination is not overly intrusive into the jury's province and would seem to represent a reasonable balancing of the court's and jury's roles. Because of the unique nature of expert testimony, the court must be able to assert a modest degree of control to ensure a minimum of reliability.

The proposed changes to Rule 702 are not perfect; this is not a bright-line test. If the proposed changes were enacted, courts would still have difficulty interpreting just what constitutes "reasonable reliability." Nonetheless, the changes would provide the courts with the requisite authority to make a threshold judicial determination of reliability. However, until the Federal Rules change, courts have little latitude and should defer to the jury on all questions of reliability.

Kimberly M. Skaggs